STATE OF MICHIGAN

COURT OF APPEALS

WESTEASE YACHT SERVICE, INC., Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED June 17, 2008
v	No. 277401 Allegan Circuit Court
PALM BEACH POLO HOLDINGS, INC., Defendant/Counter-Plaintiff-Appellee.	LC No. 05-037759-CK

Before: White, P.J., and Hoekstra and Smolenski, JJ.

WHITE, P.J., (*dissenting*).

I respectfully dissent.

The circuit court granted plaintiff's request for reformation of the contract explaining:

> Polo is an experienced real estate company. It negotiated a sublease agreement with Westease while it was in the middle of heated litigation over the Master Lease. The evidence at trial clearly supports Westease's claim that Polo represented to it that the sublease included 575 feet of frontage. While Polo was negotiating the sublease with Westease based on 575 feet of frontage, it was negotiating a lower rent for itself under the Master Lease, using a description of the property that included only 235 feet of frontage. This conduct, to say the least, is inequitable. To prevent Polo from unjustly profiting from this questionable conduct, this Court will reform its sublease agreement to reflect the premises actually leased.

Polo's litigation with its lessors was concluded in May 2004 with the entry of an order that had a drawing attached, which established that the property subject to the Master Lease included 235 feet of river frontage. The trial court's explanation for making the reformation of the contract effective as of the month plaintiff filed its complaint (May 2005) is contained in footnote 8 of its opinion:

> Westease could not identify exactly when it learned of the May 2004 Order. Because Westease could not identify when it ceased using the extra river frontage,

this Court will reform the instrument from the date (month) Westease filed this Complaint.

Westease filed a motion for clarification or reconsideration, citing MCR 2.119. Westease argued that the reformation should be effective from the conception of the lease, that it never used the extra footage, and that if it owed money for rent on the added footage, it was owed to the owners of the property. The motion was heard by a different judge, the original trial judge having retired. The second judge determined that MCR 2.611 was the applicable court rule and that the first court's ruling was not against the great weight of the evidence.

There is no explanation in the record that would provide insight into how the initial judge would have responded to Westease's motion. Nor does the second judge's ruling shed light on the subject. Admittedly, matters were complicated by the fact that a second judge heard the motion for reconsideration. With all that said, however, I conclude that given the trial court's reasoning as expressed in its opinion, the reformation of the sublease should have been made effective at least beginning with the entry of the order in the litigation involving the Master Lease, at which point it was clear that the property being leased to plaintiff included riverfront frontage of 235 feet, and not 575 feet.

I would remand for entry of an order reforming the sublease agreement effective May 28, 2004.

/s/ Helene N. White